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January 18, 2011

## VIA E-FILING

Cynthia T. Brown, Chief  
Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington DC 20423-0001

228641

Re: *Indiana Southwestern Railway Co. – Abandonment Exemption – In Posey and Vanderburgh Counties, IN*, STB Docket No. AB-1065X

## EXPEDITED CONSIDERATION REQUESTED

Dear Ms. Brown:

Attached hereto is Indiana Southwestern Railway Co.'s ("ISW") Motion to Compel Responses to Indiana Southwestern Railway Co.'s First Discovery Requests To the Town of Poseyville and Reply in Opposition to the Town of Poseyville's Petition for Exemption from the Provisions of 49 U.S.C. 10904(e) (the "Motion and Opposition"). Consistent with other, recent ISW filings in this proceeding, the attached Motion and Opposition requests expeditious Board action on the issues addressed herein.

If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

ENTERED  
Office of Proceedings

JAN 18 2011

Part of  
Public Record

Sincerely,



William A. Mullins

Enclosures

cc: J. Michael Carr  
Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC**

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**STB Docket No. AB-1065X**

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**INDIANA SOUTHWESTERN RAILWAY CO.  
– ABANDONMENT EXEMPTION –  
IN POSEY AND VANDERBURGH COUNTIES, IN**

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**MOTION TO COMPEL RESPONSES TO INDIANA SOUTHWESTERN  
RAILWAY CO.'S FIRST DISCOVERY REQUESTS TO THE TOWN OF POSEYVILLE  
AND REPLY IN OPPOSITION TO THE TOWN OF POSEYVILLE'S PETITION  
FOR EXEMPTION FROM THE PROVISIONS OF 49 U.S.C. 10904(E)**

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**EXPEDITED CONSIDERATION REQUESTED**

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**Attorneys for Indiana Southwestern  
Railway Company**

**January 18, 2011**

**BEFORE THE  
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**EXPEDITED CONSIDERATION REQUESTED**

Pursuant to 49 CFR § 1114.31(a), Indiana Southwestern Railway Company ("ISW") hereby moves for the Board to compel the Town of Poseyville (the "Town" or "Poseyville") to make full and complete responses to ISW's discovery requests of December 23, 2010, within three days as specified herein. In addition, ISW hereby replies in opposition to Poseyville's request to be exempted from the provisions of 49 U.S.C. § 10904 governing the deadline for filing requests to set terms and conditions in offer of financial assistance proceedings ("OFA"). As discussed below, discovery is available to parties engaged in OFA proceedings where the discovery is relevant to the issue being determined. In this case, all of ISW's discovery requests seek relevant information concerning whether the Town is financially responsible and a bona fide offeror – issues upon which the very progress of this OFA proceeding depend.

As is also discussed below, the Town's request for an open-ended deadline to prepare and file its request to set terms and conditions should be denied. The OFA process was intentionally streamlined by Congress to protect the interest of carriers seeking to abandon rail lines, and,

while ISW had been amenable to a limited, 30-day postponement of the OFA process here to allow time for negotiations and important threshold matters to be resolved prior to the deadline for a request to set terms and conditions, any additional extension of the OFA deadline beyond February 18 – especially the sort of open-ended extension that Poseyville seeks – is prejudicial to ISW and contrary to the guiding principles of the OFA statute. Finally, the Town is incorrect with respect to the standard that the Board applies in cases involving appeals of Director’s decisions on OFA’s and, as such, the Board should move forward with the appeal.

### **BACKGROUND**

Pertinent background on this proceeding was set forth in ISW’s Appeal and Motion to Hold in Abeyance” (the “ISW Appeal and Motion”) of December 30, 2010, and in ISW’s Supplement to the Appeal and Motion (the “ISW Supplement”) filed on January 12, 2011. The background information in both of those prior filings is hereby incorporated into this Supplement by reference.

Supplemental to the background information contained in the ISW Appeal and Motion and the ISW Supplement, on January 13, 2011, Poseyville filed what it entitled a “Reply in Opposition to Appeal, Motion to Hold in Abeyance, and Request for Discovery, and Petition for Exemption from 49 U.S.C. 10904(e)” (the “Town Reply and Petition”). In the Town Reply and Petition, Poseyville – (1) replied in opposition to ISW’s appeal of the decision of the Director of the Office of Proceedings (the “Director”) accepting Poseyville’s OFA and allowing the proceeding to go forward; (2) opposed ISW’s motion to hold the OFA proceeding in abeyance to provide for timely discovery, and to allow the Board adequate time to address ISW’s appeal; (3) objected categorically to the discovery that ISW had served upon it (asserting that discovery is not permitted in OFA proceedings); and (4) petitioned for an exemption from Section 10904(e)

in order to avoid the applicable statutory deadline for filing a request to set terms and conditions for the purchase of the 17.2-mile rail line (the “Line”) that is the subject of this OFA proceeding.

Also on January 13, 2011, the Director issued an order (the “January 13 Order”) granting ISW’s abeyance request, and setting the new deadline for a request to set terms and conditions on February 18, 2011. In tolling the OFA proceeding, the Director stated that her action would, among other things, permit the Board sufficient time to address ISW’s appeal and Poseyville’s exemption petition before the newly-extended due date for a request to set terms and conditions. (The Director mentioned, but did not specifically weigh in upon, the parties’ discovery dispute, and she did not indicate how the Board intended to address that dispute.)

## **ARGUMENT**

### **I. DISCOVERY IS APPROPRIATE IN ABANDONMENT AND OFA PROCEEDINGS, AND POSEYVILLE SHOULD BE ORDERED TO RESPOND FULLY AND SUBSTANTIVELY TO ALL OUTSTANDING DISCOVERY**

Poseyville contends that it was permissible for it to have ignored entirely ISW’s December 23 discovery requests, or to even address the discovery, because discovery is not permitted in OFA proceedings. The Town is wrong – discovery is permissible in OFA proceedings, parties occasionally do rely on discovery to address OFA issues such as those at play here, and the Board has contemplated and sanctioned the use of discovery in such cases.

Poseyville attempts to excuse its stonewalling tactics by relying on the claim that the OFA process is the sort of “informal proceeding” for which discovery is not permitted under 49 CFR § 1114.21(a)(1). Poseyville offers no precedent or other legal support for its claim that this proceeding is an “informal proceeding” for which discovery is not permitted, depending instead on the assertion that the statutory time constraints reflect the alleged “informality” of the OFA process. Poseyville’s reliance on the time limitation factor does not provide a legal basis for its assertion that this proceeding is an “informal proceeding” under the regulations so as to make

discovery inapplicable. Indeed, the Board has specifically approved of the use of discovery in abandonment and OFA proceedings. The Board's stated policy is that contested discovery will be granted in abandonment proceedings when the party seeking discovery shows that the information sought is relevant and might affect the result of the case. See SWKR Operating Co. - Abandonment Exemption--In Cochise County, AZ, STB Docket No. AB-441 (Sub-No. 2X), slip op. at 2 (STB served Feb. 14, 1997). In this case, the information sought by ISW is highly relevant as it goes precisely to the issue of whether the Town is financially responsible and a bona fide offeror – issues upon which the very progress of this OFA proceeding depend.

Furthermore, a mere review of various other OFA cases establishes that discovery is available in OFA proceedings, has been used in such proceedings, and has been specifically endorsed by the Board as an appropriate method to clarify issues in OFA proceedings. Agency decisions reflect that parties to OFA proceedings, and the Board itself, find discovery useful to illuminate issues in dispute, to obtain information necessary to prepare valuation evidence, and, as is important here, to demonstrate that an offeror is not financially responsible or is not bona fide.<sup>1</sup> In short, even in OFA proceedings, discovery can be critical to permitting a party to make

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<sup>1</sup> See, e.g., Railroad Ventures – Abandonment Exemption – Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X) (“Railroad Ventures”), slip op. at 5 STB served Dec. 13, 2004 (“If [the abandoning railroad] had questions about [the offeror’s real estate valuation] calculations, [the railroad] should have deposed [the offeror’s witness] during the 30-day statutory period or as soon thereafter as it suspected there were errors”); Illinois Central Railroad Company – Abandonment Exemption – In Perry County, IL, Docket No. AB-43 (Sub-No. 164X), 1994 ICC LEXIS 292, at \*\*3-4 (“Illinois Central”) (ICC served Jan. 12, 1995) (railroad engaged in discovery in the course of OFA proceeding to obtain information to challenge the offeror’s bona fides, presenting procedural challenges to the railroad to make a timely presentation of important evidence on this issue. On this issue, the agency remarked as follows: “The short deadlines established for the OFA procedure are ill-suited to controversial matters involving discovery. [But] [f]undamental fairness requires that [the railroad] be accorded a reasonable opportunity to develop and present its case”); Union Pacific Railroad Company – Abandonment Exemption – In Lancaster County, NE; in the Matter of a Request to Set Terms and Conditions, Docket no. AB-33 (Sub-No. 71X) (ICC served Sept. 28, 1992) (through the use

its case for or against the continuation of the proceeding. Indeed, as the Illinois Central case makes clear, even under the tight OFA timeframes, fundamental fairness requires that ISW be able to obtain evidence through discovery and, as appropriate, to introduce such evidence into the record.

Poseyville has registered only a misguided categorical objection to discovery. It has evaded its obligation to respond substantively or to register general or specific objections to the discovery served upon it, and its categorical objection is not even timely under the applicable Board rules. For these reasons, in the interest of timely conclusion of discovery, and also because all of ISW's discovery requests are appropriate under the Board's rules, the Board should deem Poseyville to have waived general or specific objections to ISW's discovery and order Poseyville to provide, within 3 days of any Board ruling on this Motion To Compel, its substantive responses to the interrogatories and all-relevant documents.<sup>2</sup> - -

As previously noted, ISW's discovery requests seek information that is relevant to key issues in this proceeding, and, as such, they satisfy the standard for compelling discovery in abandonment and OFA proceedings. ISW's discovery requests are all carefully crafted to address the two issues properly at issue in ISW's appeal – Poseyville's financial responsibility, and Poseyville's bona fides. To this point, Poseyville has done absolutely nothing to assuage ISW's concerns that it does not possess the funds to purchase the Line, or to demonstrate that the

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of discovery, abandoning carrier was able to persuade the agency that the offeror's efforts were not aimed at helping shippers dependent upon rail service, that the offer was, accordingly, not bona fide, and that the OFA process should be terminated).

<sup>2</sup> In order to ensure timely production and use of any discovery, the Board should waive its usual discovery rules going forward in order to prescribe an expedited discovery process that will enable to the Board to have a fully-developed record to meet its commitment to rule on ISW's appeal prior to the terms and conditions deadline of February 18. If the Board cannot ensure completion of discovery by that date, then ISW wishes to convey that, in light of the objectives of the OFA statute, no further extension of the deadline to request the setting of terms and conditions should be ordered without ISW's consent.

Town is pursuing the OFA for appropriate purposes. Responses to all of ISW's carefully-tailored discovery requests would be most illuminating and would doubtlessly bear on whether the Board should sanction the continued use of its OFA processes here. In fact, most of the discovery requests, which are generally in the form of interrogatories, should be very easy for Poseyville to respond to, focus on information that is unquestionably in Poseyville's possession, seek information that ISW does not have and that ISW could not easily obtain through other means, and request information that would not be burdensome for Poseyville to supply. For this reason, ISW urges the Board to order Poseyville to respond fully and substantively, and without objection, to each of ISW's December 23 discovery requests.

**II. THE BOARD SHOULD DENY POSEYVILLE'S REQUEST FOR AN OPEN-ENDED EXTENSION OF THE DUE DATE TO REQUEST THE BOARD TO SET TERMS AND CONDITIONS**

On the one hand, Poseyville tries to evade discovery because of the limited OFA timeframes, which have now been extended by 30 days and thus provide sufficient time for the Board to compel responses and for the Town to produce the information ISW seeks. On the other hand, Poseyville complains of these same limited OFA timeframes, and, ignoring the Congressional objective behind those timeframes, asks for the Board to repudiate the very purposes of 49 U.S.C. 10904(e) by granting the Town an open-ended deadline to file a request to set terms and conditions whenever the Town considers itself ready. Poseyville's request should be denied. It is not only contrary to the fundamental purpose of the provision it seeks to evade, but it is utterly at odds with the rail transportation policy of 49 U.S.C. § 10101. ISW objects without qualification to the exemption request, and it objects to any other extension or postponement of the OFA procedural schedule without ISW's express consent.

The sole basis for Poseyville's request for an open-ended time frame to prepare its terms and conditions request is that the Town believes that it "wouldn't be fair" to require strict



adherence to the 30-day time frame. It offers the same explanation for why it would have been unable to meet the original January 19 deadline (the Town filed its request before the Board's January 13 decision granting a 30 day extension). And why does the Town insist that adherence to the statutorily-mandated schedule wouldn't have been fair? Because the Town protests that it was "preoccupied with researching and preparing" its reply to ISW's appeal and abeyance request, and would not have had time to complete its terms and conditions request on January 19.

Poseyville's self-serving excuse is not a legal basis for granting an open-ended extension of either the original deadline or the current February 18 deadline. As the Board has previously remarked, "[a]lthough the 30-day time frame [to prepare and file a request to set terms and conditions] is short, it is the time allotted by Congress. Other carriers and offerors in OFA proceedings are able to comply with it, submitting detailed evidence."<sup>3</sup> If other offerors have been required to comply with the OFA statute, and have done so, then there is no reason why the Town should be excused for its intended non-compliance, especially where the net effect of the Board's January 13 decision is to give the Town 60 days (the original 30 day period and now the 30 days during the abeyance period) to prepare and file its request to set terms and condition.

Indeed, unlike the Town, ISW was prepared complete this OFA process within the time frames set forth in section 10904 and was prepared to respond within five days(i.e., by January 24) to whatever the Town would have filed on January 19. Of course ISW would have preferred to have saved the time and considerable expense related to hiring consultants, attorneys, and real estate experts, but the Director's acceptance of the OFA and the resulting very short time frame

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<sup>3</sup> Railroad Ventures, slip op. at 5.

for ISW to prepare its evidence (35 days after acceptance of the OFA, with a large portion of that time consisting of holidays) meant that ISW had to proceed with all due haste. And while ISW was hoping that discovery, its appeal, and the Board's processes would allow the Board to reconsider the Director's acceptance of the OFA and thus potentially save ISW further considerable expense, the Town's absolute refusal to comply with discovery or to respond to numerous inquiries meant that ISW had no choice but to move forward with its analysis at the same time it pursued various remedies at the Board.

As a result, up until the Board's January 13 late release decision, ISW was proceeding on the assumption that it would be required to present its reply evidence five days after the January 19 deadline. Yet, in the meantime, the Town refused to answer discovery, refused to respond to numerous phone calls and emails until just late last week, and, we now know (based upon last Thursday's filing), was doing nothing to meet the original terms and conditions request deadline. Then, having indicated that it had not taken the steps necessary to file a timely terms and conditions petition on January 19, Poseyville now asks the Board to excuse it from its own lack of planning and time management, and to give it an open-ended extension. This request should be denied.

Poseyville's request for an open-ended extension of the OFA deadlines is glaringly at odds with the dual objectives of the OFA statute. Those objectives were discussed in a fairly recent Board decision as follows:

Through the OFA program, Congress sought to preserve rail service for the shipping public over a rail line that would otherwise be authorized for abandonment, while allowing an owner that is losing money on the line to sell it for fair market value, by conferring upon financially responsible parties a right to acquire such a rail line for the constitutional minimum value of the property. See Consolidated Rail Corp. v. ICC, 29 F.3d 706, 712 (D.C. Cir. 1994) and S. Rep. No. 96-470, 96th Cong., 1st Sess. 40 (1979). However, to protect the selling/abandoning railroad from bearing the financial burden of holding and operating the rail line for an extended period of time, Congress established time

frames for conducting the OFA process, including the time for making offers to purchase or subsidize the line. See H. R. Rep. No. 96-1430, 96th Cong., 1st Sess. 125, reprinted in 1980 U.S. Code Cong. & Admin. News 4110, 4157 (the OFA provisions will “assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process”). In interpreting and administering the OFA provisions, including the time frame for submitting an OFA, the Board seeks to accommodate and harmonize Congress’ dual objectives of preserving rail service where possible, while protecting the owning railroad from bearing the costs associated with unreasonable delay.

CSX Transportation, Inc. – Abandonment Exemption – In Franklin County, PA, STB Docket No. AB-55 (Sub-No. 568X), slip op. at 3-4 (STB served Jan. 20, 2004).

Poseyville’s exemption would give the Town unfettered discretion to extend the due date to file a request to set terms and conditions to a time that it deems “reasonable.” In the process, the Town intends to do what Congress specifically designed the OFA process to protect against – the tedious extension of the abandonment process, and the imposition of further financial burdens on the abandoning carrier. The Board has, upon ISW’s request, allowed for a 30-day extension of the OFA process, but any extension of the now February 18 due date for a request to set terms and conditions, without ISW’s consent, would be both contrary to the OFA statute and highly prejudicial to ISW’s ability to salvage or reuse the rail and to sell the real estate or convert it to a trail

At this time, ISW is ready, willing, and able to present its Line valuation evidence within days, and despite its prior request for abeyance, ISW would have been willing to present its case in response to a Poseyville request to set terms and conditions under the original time frame. ISW was also willing to negotiate a private sector solution. Indeed, both ISW’s in-house and the undersigned counsel have attempted on numerous occasions to contact the Town’s attorney, but have been unable to get a response. In fact, it was only within the past week and half that the undersigned counsel had his phone calls returned, and even then, Poseyville has been less than

forthcoming in negotiations and discussions (having, for example, declined to execute a confidentiality agreement that ISW offered to facilitate discussions and refused to several phone calls).

Just last week, shortly before the Director's January 13 Order issued, the Town conveyed that it was not interested in purchasing the Line through private sector negotiations unless other portions of ISW's railroad (which portions are not involved in this proceeding) were included, and, that, if ISW was unwilling to cooperate in such a larger-scale transaction, Poseyville would instead pursue its options through the OFA process at the expense of other alternatives. For this reason and others, ISW has serious doubts about Poseyville's intention to do anything but to continue to refuse to respond to discovery and continue to ask for even more time to prepare its terms and conditions request. At this point, the 30-day postponement period will be helpful to permit the Board to compel the Town to respond to discovery, thereby allowing the record to be further developed so the Board can undertake an informed ruling on ISW's appeal before the February 18 terms and condition request deadline. But, unfortunately, the Director's January 13 Order also has the perverse effect of rewarding Poseyville with more time to prepare its valuation evidence (something it should have been doing all along) at the same time that the Town avoids future negotiations.<sup>4</sup>

### **III. THE TOWN IS INCORRECT AS TO THE APPROPRIATE STANDARD TO BE APPLIED IN APPEALS OF DIRECTOR DECISIONS AND THE BOARD SHOULD MOVE FORWARD WITH ISW'S APPEAL**

Finally, as the Board is well aware, ISW has appealed the Director's order of December 23, 2010, issued pursuant to the Director's authority at 49 CFR 1011.7(a)(2)(ii). In assailing

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<sup>4</sup> One of the main purposes for ISW's 30 day abeyance request was to help facilitate negotiations. ISW continues to be open to reaching a private sector resolution and will once again reach out to the Town. As indicated above, however, the Town informed ISW early last week that it was no longer willing to buy the line through private negotiations and has refused to sign a confidentiality agreement so as to facilitate further discussions.

ISW's appeal, Poseyville contends that the applicable Board standard of review is contained at 49 CFR § 1011.6(b). Poseyville is wrong. Section 1011.6 does not pertain to authority delegated by the Board to the Director for purposes of OFA oversight; instead, the appropriate citation is 49 CFR § 1011.7(a). As is discussed below, there appears to be no specific standard of review for appeals of a Director's order accepting an OFA, and certainly there is no standard where one would most logically be found – in Section 1011.7(a) itself. Not only does a careful examination of the Board's regulations suggest the absence of a specific standard of review in this case, but also ISW's examination of Board decisions on appeals of Director's orders accepting or rejecting an OFA do not articulate or employ any particular standard of review.

The Board's regulations simply do not contain a provision specifically setting forth the standard of review for Director's orders issued pursuant to her authority under Section 1011.7(a), and certainly Section 1011.6(b) is not it. At most, the Board has taken a case-by-case approach to such appeals. In this case, ISW believes that, once it obtains discovery, it will be able to establish that the Director's decision finding the Town to be a financially responsible party and a bona fide offeror should be reversed.

It is important to keep in mind that Section 1011.6(b) – dealing only with delegations of authority by the Board's *Chairman* (but upon which Poseyville mistakenly relies nevertheless) – provides that appeals under “this section” (clearly meaning delegations of authority carried out under Section 1011.6, not Section 1011.7, nor Part 1011 generally) are not favored and will be granted only in “exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” The Town would like the Board to apply that standard when reviewing ISW's appeal, but the Director's authority to act in the first instance on OFA petitions was not delegated to the Director by any order of the Board's Chairman or, for that matter, pursuant to any authority under Section 1011.6. Rather, the *Board* has delegated such authority to the

Director pursuant to another section, specifically, Section 1011.7(a)(2)(ii). And, as mentioned, *that* section of the regulations (section 1011.7(a)) contains no appellate standard at all.

The absence of a specific standard of review in Section 1011.7(a) may not be an accident. Because the Director has been delegated many substantive responsibilities which can have meaningful impact upon the rights and interests of parties in Board proceedings, the agency may have, by omitting a specific standard, designed not to circumscribe its flexibility to act and to rule on appeals as circumstances might require. If so, then the Board's omission of a standard is an accommodation to the Board's need to be pragmatic and flexible, particularly where, as is the case here, there is no provision or standard for "reopening" or "reconsidering" a Director's order, even though it is evident that, in some cases such an order may warrant reopening or some other remedial Board action based upon, for example, changed circumstances or new evidence.<sup>5</sup>

ISW's review of prior OFA proceedings reflects that the Board's decisions on appeal of a Director's order accepting or rejecting an OFA do themselves support the proposition that the Board does not believe itself constrained to apply a specific set standard of review, and that the Board certainly doesn't apply the "exceptional circumstances" test that the Town argues for here. See, e.g., Union Pacific Railroad Company – Abandonment – In Polk County, IA; In the Matter of an Offer of Financial Assistance, STB Docket No. AB-33 (Sub-No. 170) (STB served Mar. 22, 2002) (in reversing on appeal Director's decision to reject an OFA, Board did not articulate any particular standard of review); Trinidad Railway, Inc. – Abandonment Exemption – In Las Animas County, CO, STB Docket No. 573X (STB served Aug. 13, 2001); Roaring Fork Railroad Holding Company – Abandonment Exemption – In Garfield, Eagle, and Pitkin

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<sup>5</sup> The Board's rules at 49 CFR Part 1115 provide for reopening and reconsideration of final Board decisions, but, as indicated, there is no provision for similar handling of Director's orders. It appears that the absence of a standard of appeal in section 1011.7(a) gives the Board latitude to engage in similar such reopening and reconsideration where such action is warranted.

Counties, CO, 4 S.T.B. 116 (1999), STB Docket No. 547X (without articulating a standard of review, Board dismissed proceeding on appeal following Director's decision accepting OFA).

As these cases show, Poseyville is plainly incorrect to assert that Section 1011.6(b) prescribes the standard of review for a Director's order accepting an OFA. The correct standard seems to be a case-by-case review based upon the evidence in the record. In this case, it is true that at this time ISW only has circumstantial evidence to support its claim that the Town should not be provided the presumption of financial responsibility that the Director applied and that the Board's regulations provide. Nonetheless, ISW is convinced that once it is able to obtain more information through discovery, it will be able to show that the Town is neither financially responsible nor a bona fide offeror, and such information will rebut the presumption the Director has relied upon and that the Town has hidden behind. As such, until the discovery process is complete, any action on ISW's appeal would be premature without the information that Poseyville has purposefully withheld by evading discovery.

Finally, even if a standard like the one in Section 1011.6(b) were applicable here, which it is not, there would be sufficient basis under that stand for the Board to reverse the December 23 Director's order anyway. Should evidence come to light that Poseyville is not financially responsible or not a bona fide offeror, then failure to terminate the OFA process at that point would be manifestly unjust and the "exceptional circumstances" of the case and evidence would more than merit a reversal of the Director's order.

#### **REQUEST FOR EXPEDITED HANDLING**

For the reasons set forth in the ISW's Supplement, ISW reiterates its request for expedited Board handling. The information that ISW has been forced to seek through discovery would be critical to the Board's assessment of ISW's appeal, and could have an immediate bearing upon whether the OFA proceeding ought to be allowed to go forward at all. Expeditious

Board action, particularly on the motion to compel may determine whether the Board has critical information at its disposal in time to avoid significant next steps in this process. Moreover, Poseyville's dilatory tactics in ignoring discovery beyond the due date for responses have already consumed much of the limited time allowed for OFA. Such efforts should not be rewarded. A swift processing of the outstanding discovery issues would do much to reign in procedural abuse.

### **CONCLUSION**

Poseyville's conduct in this case consistently reflects an unwillingness to deal with the Board and with ISW in an open and constructive dialogue. The Town has hidden behind the threshold presumption, contained in the Board's regulations, that it is financially responsible and a bona fide offeror. It has failed to respond to discovery which was specifically designed to test that presumption. It has conducted sporadic and non-responsive negotiations, and it now seeks an open-ended delay. If Poseyville's purpose here were truly to acquire the Line for continued rail service in order to maintain rail service to its community and it truly had the financial resources to acquire the Line, i.e. was a financially responsible party and a bona fide offeror, one would think it would want to move quickly and would have no qualms responding to discovery. Instead, Poseyville's prosecution of its OFA is marked with purposeful delay and evasion and it now seeks the Board's tacit consent to this approach. For the reasons supplied above, Poseyville is entitled to no such reward.

As a matter of Board practice, discovery is permitted in OFA proceedings, and it is keenly necessary here. Accordingly, ISW urges the Board to compel Poseyville to provide full and complete responses to its outstanding discovery requests under the expedited timetable ISW has requested above. In addition, as is set forth above, there is absolutely no basis for granting Poseyville's request to extend the statutory OFA deadlines beyond what the Board has already



adopted. Such an extension is utterly contrary to the Congressional policy behind the tight timeframes set forth in Section 10904, and it is highly (and purposely) prejudicial to ISW – and it must be denied. Finally, in yet another attempt to evade appropriate Board scrutiny, Poseyville would have the Board employ a standard of review in assessing ISW's appeal that is neither in keeping with the applicable Board regulations nor consistent with past precedent. Rather than allowing its own hands to be tied, the Board should abide by its past practice of reviewing Director's orders such as the one at issue here on a case-by-case basis.

Respectfully submitted,



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Attorneys for Indiana Southwestern  
Railway Company

January 18, 2011

### **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing by mailing copies of Motion to Compel Responses to Indiana Southwestern Railway Co.'s First Discovery Requests directed at the Town of Poseyville and Reply in Opposition to the Town of Poseyville's Petition for Exemption from the Provisions of 49 U.S.C. 10904(e) via prepaid first class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 18<sup>th</sup> day of January, 2011.



William A. Mulhns  
Attorney for Indiana Southwestern  
Railway Company